SCC File No. 38734

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

-and-

RICHARD LEE DESAUTEL

Respondent
(Respondent)

-and-

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PART I - OVERVIEW

1. The Attorney General of Saskatchewan ("Attorney General") intervenes in this matter pursuant to Rule 33(4) of the *Rules of the Supreme Court of Canada*. The Attorney General adopts the facts set out in the Appellant's Factum.

2. Whether the Respondent falls within the meaning of "aboriginal peoples of Canada" in s. 35 is a threshold issue that should be answered separately from the *Van der Peet* test for determining Aboriginal rights.[1] The Court can be guided by how it has addressed parallel threshold questions for two other constitutional provisions relating to Aboriginal peoples:

   a. In *R v Blais*, the Court considered whether the Métis fall within the meaning of "Indians of the Province" in the harvesting clause of the *Natural Resources Transfer Agreement, 1930* ("NRTA").[2] The question was answered based on the provision's linguistic, philosophic and historic context, separately from whether hunting rights existed on the specific facts of the case. Whether the Respondent falls within the meaning of "aboriginal peoples of Canada" in s. 35 should be answered in the same manner.

   b. In *Daniels v Canada (Indian Affairs and Northern Development)*, the Court considered whether Métis and non-status Indians fall within the meaning of "Indians" in s. 91(24) of the *Constitution Act, 1867*.[3] The Court effectively answered the question as a threshold issue by placing the term in its proper linguistic, philosophic and historic context, separately from the scope of Parliament's power to legislate in relation to those groups. The same general approach should be taken here, particularly when the Court in *Daniels* held that ss. 35 and 91(24) should be read together.[4]

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[1] *R v Van der Peet*, [1996] 2 SCR 507.
[2] *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236.
[3] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99.
[4] At para 34, citing with approval *R v Sparrow*, [1990] 1 SCR 1075 at 1109 and *Manitoba Métis Federation Inc. v Canada (Attorney General)*, [2013] 1 S.C.R. 623 at para 69.

3. Section 35's linguistic, philosophic and historic context does not support the Respondent's claim. The various uses of the phrase "of Canada" in the Constitution generally, and in the *Constitution Act, 1982*, in particular, cannot be construed as applying to foreign countries or their communities. The phrase "of Canada" in s. 35 should be interpreted consistently with its other uses in the Constitution.

4. This Court has never held that s. 35's purpose was to reconcile Crown sovereignty with non-Canadian Indigenous communities whose ancestors may have lived on or utilized lands that became part of Canada. Rather, the Court has characterized reconciliation in terms of the relationship between non-Aboriginal Canadians and Aboriginal peoples as full members of and participants in Canadian society. Non-Canadian Indigenous communities do not fit within this understanding of reconciliation.

5. Constitutional rights are not created gratuitously in a contextual vacuum. If s. 35 was intended to include non-Canadian Indigenous communities, then it is to be expected that there would have been significant consideration of the issue leading up to the *Constitution Act, 1982*. Yet there is nothing in the record showing that such a novel constitutional measure was ever contemplated, which belies any intention to include non-Canadian Indigenous communities within s. 35's purview.

6. The Respondent urges this Court to give special consideration to the Aboriginal perspective on the meaning of "aboriginal peoples of Canada" in s. 35. This conflates the *Van der Peet* test with the threshold question. The *Van der Peet* test does not *answer* the threshold question. It is contingent upon it. No special consideration of the Aboriginal perspective was given by this Court to determine the meaning of "Indians" in either the NRTA or s.91(24). None should be given here.

PART II - STATEMENT OF ISSUES

7. The Appellant's Notice of Constitutional Question raises the issue of whether the Respondent has an Aboriginal right under s. 35 of the *Constitution Act, 1982*, rendering sections 11(1) and 47(a) of the *Wildlife Act*, RSBC 1996 c. 488, of no force and effect.

PART III - ARGUMENT

A. Threshold Issue Precedents

8. The lower courts in this matter conflated the threshold issue of *who* falls within s. 35's purview, with the separate issue of *which* Aboriginal rights are protected by s. 35. The test for answering the latter question was outlined in *Van der Peet* and has been applied to determine claims made by *Canadian* Aboriginal peoples of, for example, commercial fishing rights;[5] a right to harvest wood for personal uses;[6] a self-government right to regulate gaming;[7] and a right to cross an international border for purposes of trade.[8] Title claims made by Canadian Aboriginal peoples have also been considered by this Court.[9] Whether the claimants in those matters fell within the meaning of "aboriginal peoples of Canada" was not at issue (they clearly did), and thus the Court was not required to address that threshold question.

9. For the present matter, the Court can be guided by how it has addressed parallel threshold questions for two other constitutional provisions relating to Aboriginal peoples: the NRTA's harvesting clause and s. 91(24) of the *Constitution Act, 1867*.

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[5] *R v Van der Peet, supra*.
[6] *R v Sappier; R v Gray,* 2006 SCC 54, [2006] 2 SCR 686.
[7] *R v Pamajewon,* [1996] 2 SCR 821.
[8] *Mitchell v M.N.R.,* 2001 SCC 33, [2001] 1 SCR 911.
[9] *Delgamuukw v British Columbia,* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, [2014] 2 SCR 257.

i. The NRTA's Harvesting Clause

10. Over fifty years before the *Constitution Act, 1982*, Indigenous harvesting rights were constitutionalized in the Provinces of Manitoba, Saskatchewan and Alberta ("the prairie provinces") under the NRTA. This Court's jurisprudence on the NRTA's harvesting clause provides a wealth of insight on how to approach the question raised in the present matter.

11. The NRTA refers to largely identical agreements between Canada and the prairie provinces. Those agreements became part of Canada's Constitution as schedules to the *Constitution Act, 1930*.[10] Their overall purpose was to put the prairie provinces on an equal footing with the original provinces in Confederation by giving them jurisdiction and beneficial ownership over the natural resources.[11]

12. Paragraphs 10-12 (paras. 11-13 of the Manitoba NRTA) relate to "Indians". Paragraph 10 concerns Canada's jurisdiction and responsibility for administering Indian reserves. Paragraph 11 addresses questions concerning the sale or lease of Indian reserve lands. Paragraph 12 ("the harvesting clause") protects Indian rights to hunt, trap and fish for food:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access. [Underlining added]

13. Like s. 35, the NRTA's harvesting clause has given rise to three separate questions: (1) to whom does the provision apply? (2) what is the scope of the right? (3) how does the provision affect the division of federal and provincial powers?

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[10] *Constitution Act, 1930*, RSC 1985, Appendix II, No. 26.
[11] *R v Blais supra* at para 10. Also see paragraph 1 of the NRTA.

14. *R v Blais* is this Court's leading decision with respect to the first question – to whom does the provision apply? At issue was whether Métis peoples fall within the meaning of "Indians of the Province". The Court interpreted the provision based on its linguistic, philosophic and historic context, without regard to the separate question of whether hunting rights existed on the specific facts of the case. Indeed, the Crown admitted that the claimant was hunting for food on "unoccupied Crown lands" within the meaning of the clause.[12] Only the first issue was in play. That approach should be followed here. The *Van der Peet* test should have no bearing on the threshold issue before this Court.

15. The second question arising out of the NRTA's harvesting clause concerns the existence and scope of rights claimed thereunder. This has been considered in cases such as *R v Mousseau* (whether public roads are "unoccupied Crown lands");[13] *R v Horseman* (whether the term "for food" extinguished commercial rights);[14] and *R v Badger* (under what circumstances are private lands "lands to which the said Indians may have a right of access"?).[15] It was not disputed in any of those cases that the claimants were "Indians of the Province" contemplated by the provision.

16. The third question arising out of the harvesting clause concerns federal and provincial jurisdiction. This was at issue in cases such as *Daniels v White and The Queen* (whether Indians are exempt from federal game laws under the NRTA);[16] *Cardinal v The Attorney General of Alberta* (whether provincial game laws apply on Indian reserves);[17] and *The Queen v Sutherland et al.* (whether provincial game laws singling out Indians are *ultra vires*).[18] Again, no threshold issue arose in these cases as to whether the claimants fell within the provision's purview.

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[12] At para 4.
[13] *R v Mousseau*, [1980] 2 SCR 89.
[14] *R v Horseman*, [1990] 1 SCR 901.
[15] *R v Badger*, [1996] 1 SCR 771.
[16] *Daniels v White and The Queen*, [1968] SCR 517.
[17] *Cardinal v Attorney General of Alberta*, [1974] SCR 695.
[18] *The Queen v Sutherland et al.*, [1980] 2 SCR 451.

17. Section 35 has given rise to the same three separate issues. The existence and scope of rights were considered in *Van der Peet* and its progeny. Jurisdictional questions were considered in such cases as *R v Morris* (whether provincial safety laws can restrict Treaty night hunting);[19] *Tsilhqot'in Nation v British Columbia* (whether provincial laws apply on Aboriginal title lands);[20] and *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)* (whether provinces may "take up" lands subject to Treaty harvesting rights).[21] However, the present matter is the first case in which this Court has directly considered the threshold issue of the meaning and scope of "aboriginal peoples of Canada." Again, the Court can be guided by how it has addressed parallel threshold questions for the NRTA's harvesting clause and s. 91(24).

ii. Section 91(24) of the *Constitution Act, 1867*

18. Section 91(24) grants Parliament exclusive legislative jurisdiction in relation to "Indians and lands reserved for the Indians." Case law concerning the provision has mostly addressed the scope of Parliament's authority to legislate and the applicability or operability of provincial laws. However, in two cases the Court has considered the threshold issue of who falls within the provision's purview.

19. At issue in *Reference re Eskimos* was whether "Eskimo" inhabitants of Quebec fall within the meaning of "Indians" in s. 91(24).[22] The Court answered this question in the affirmative by engaging in an historical analysis of whether those peoples inhabited British North America in 1867, and if so, whether they were referred to as "Indians" at that time.[23] The separate question of the scope of Parliament's authority to legislate in relation to "Eskimos" was not considered.

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[19] *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915.
[20] *Tsilhqot'in Nation*, *supra*.
[21] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.
[22] *Reference re Eskimos*, [1939] SCR 104.
[23] At 106.

20. More recently in *Daniels*, the Court considered whether Métis and non-status Indians fall within s. 91(24)'s purview. The Court effectively treated the question as a threshold issue, separately from the scope of Parliament's power to legislate in relation to those groups. Indeed, no federal legislation was at issue in the matter. The Court addressed the question at issue by placing the word "Indians" in its proper linguistic, philosophic and historic context.[24] The same approach should be taken here, particularly when the Court in *Daniels* held that ss. 35 and 91(24) should be read together.[25]

B. Linguistic, Philosophic and Historic Context

21. In *Blais*, this Court held that constitutional provisions must be interpreted based on their linguistic, philosophic and historical contexts:

> […] The starting point in this endeavour is that a statute – and this includes statutes of constitutional force – must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As P.-A. Côté stated in the third edition of his treatise, "Any interpretation that divorces legal expression from the context of its enactment may produce absurd results" (*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 290).
>
> The *NRTA* is a constitutional document. It must therefore be read generously within these contextual and historical confines. A court interpreting a constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure "for individuals the full benefit of the [constitutional] protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. "At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the [constitutional provision] was not enacted in a vacuum, and must therefore … be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart*, *supra*, at p. 344. […]
>
> Applied to this case, this means that we must fulfill – but not "overshoot" – the purpose of para. 13 of the *NRTA*. We must approach the task of determining whether the Métis are included in "Indians" under para. 13 by

[24] At para 19.
[25] At para 34.

> looking at the historical context, the ordinary meaning of the language used, and the philosophy or objective lying behind it.[26]

22. Thus, while constitutional provisions conferring rights are to be interpreted generously, they must also be placed in their proper contexts in order to avoid overshooting their purposes. This was stated in even stronger terms later in *Blais*, where it was held that courts are not free to invent new constitutional rights:

> […] this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore … be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra*, at p. 344; see *Côté, supra*, at p. 265. Dickson J. was speaking of the *Charter*, but his words apply equally to the task of interpreting the *NRTA*. Similarly, Binnie J. emphasized the need for attentiveness to context when he noted in *R v. Marshall*, [1999] 3 S.C.R. 456, at para. 14, that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here.[27]

23. The lower courts in this matter failed to place s. 35 in its proper context and committed the very error this Court admonished against in *Blais*: they invented rights foreign to the provision's purpose. That purpose is found expressly in s. 35, which was to entrench Treaty and Aboriginal rights of the Aboriginal peoples "of Canada".

i. Linguistic Context

24. As a general proposition, there should be no uncertainty that the phrase "of Canada" in Canada's Constitution means *of Canada* – the country for which the Constitution was

[26] At paras 16-18. Underlining added.
[27] At para 40. Underlining added. Quoted with approval in *Caron v Alberta*, 2015 SCC 56 at paras 37 & 38, [2015] 2 SCR 511.

ratified.[28] It is found repeatedly in the *Constitution Act, 1867*, qualifying "Provinces" (ss. 3, 104, 109, 120, 137); "Population" (s. 8); "Executive Government" (s. 9); "Governor General" (s. 10); "Government" (ss. 11, 12, 91, 116, 132, 142); "Naval and Military Forces" (s. 15); "Seat of Government" (s. 16); "Parliament" (ss. 18, 19, 35, 40, 41, 47, 51, 52, 59, 60, 90, 91, 94, 95, 100, 101, 105, 120, 122, 130, 131, 132, 133, 137, 141, 146); "Statutes" (s. 22); "Great Seal" (ss. 34, 38); "Legislatures" (ss. 102, 126); "Public Service" (s. 102); "Consolidated Revenue Fund" (ss. 103, 105, 106); "Property" (ss. 107, 108); "Senate or House of Commons" (s. 128); "Officers" (s. 130); and "Court" (s. 133). Those references cannot be construed as relating to the United States or its citizens.

25. The phrase is found in the *Constitution Act, 1982*, to qualify "citizen" (ss. 3, 6, 23), "official languages" (s. 16) and "Constitution" (s. 21). In s. 35.1 it is found in conjunction with "the government" and "Prime Minister". As with the *Constitution Act, 1867*, those references apply only in relation to Canada and its peoples. It would be incongruent to interpret "aboriginal peoples of Canada" differently. Ruth Sullivan has stated that "[i]t is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings." She added that "the presumption applies with particular force where the provisions in which the repeated words appear are close together or otherwise related."[29] Use of the phrase "of Canada" in s. 35, 35.1 and throughout the Constitution should be interpreted in accordance with that presumption.

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[28] In *Re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 56, the Court clarified that the meaning of "Canada" in s. 91 of the *Constitution Act, 1867*, refers to the federal as opposed to provincial "juristic unit", and thus has a different meaning in that particular context than "Canada" as a "geographical unit". The phrase "of Canada" in s. 35 does not apply to other countries or their communities on either meaning of "Canada".

[29] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at pp. 214-216.

26. In *Blais*, this Court did not accept that Métis peoples fall within the meaning of "Indians" in the NRTA's harvesting clause, in part because of how the word is used elsewhere in the document:

> The placement of para. 13 in the part of the NRTA entitled "Indian Reserves", along with two other provisions that clearly do not apply to the Métis, supports the view that the term "Indian" as used throughout this part was not seen as including the Métis. This placement weighs against the argument that we should construe the term "Indians" more broadly than otherwise suggested by the historical context of the NRTA and the common usage of the term at the time of the NRTA's enactment.[30]

27. Likewise, use of the phrase "of Canada" in s. 35.1, and in the Constitution generally, undermines the interpretation of s. 35 accepted by the lower courts in this matter.

28. It would be anomalous for non-Canadians to be "aboriginal peoples of Canada" when in *Blais* this Court held that *Canadian* Métis peoples, whose ancestors lived and harvested on lands from which Manitoba was created, are not "Indians of the Province" in the NRTA.

29. Finally, in *Frank v The Queen* this Court held that "Indians of the Province" in Alberta's NRTA means "Alberta Indians", and that the different wording "Indians within the boundaries thereof" in the clause was intended to protect rights of non-resident Indians.[31] Parity of logic and consistency of constitutional interpretation should be applied to "aboriginal peoples of Canada" in s. 35. If s. 35 was intended to confer Aboriginal rights on non-resident Indigenous communities, then it is to be expected that, as in the NRTA, express words would have been used to make that very different intention clear. Constitutional drafters were no more adroit in 1930 than in 1982.

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[30] At para 30. Underlining added.
[31] *Frank v The Queen*, [1978] 1 SCR 95 at 101-102.

ii. Philosophic Context

30. In *Van der Peet*, s. 35's purpose was described as "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[32] However, this Court has never held that reconciliation involves non-Canadian Indigenous communities whose ancestors may have lived on or utilized lands that became part of Canada. To the contrary, earlier in *Van der Peet* Lamer C.J. stated that "aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society."[33]

31. This Court has further characterized reconciliation in terms of Aboriginal peoples' ongoing co-existence and interrelatedness with Canadian society at large. Writing for the majority in *Beckman v Little Salmon/Carmacks First Nation*, Binnie J. held that s. 35's "grand purpose" is the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship".[34] Reconciliation does not involve a relationship between non-Aboriginal Canadians and non-Canadian Indigenous communities.

32. Later in *Beckman*, Binnie J. described s. 35's purpose in the following terms:

> [33] The decision to entrench in s. 35 of the *Constitution Act, 1982* the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal. At the same time, Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance.[35]

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[32] At para 31.
[33] At para 19. Underlining added.
[34] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103. Quoted with approval in *Daniels, supra*, at para 34.
[35] At para 33. Underlining added.

33. This is consistent with Binnie J.'s understanding of s. 35 in *Mitchell v M.N.R.*:

> What is "integral to the aboriginal community's distinctive culture" (*Van der Peet*, at para. 55) is constitutionally protected. In *other* respects however, the respondent and other aboriginal people live and contribute as part of our national diversity. So too in the Court's definition of aboriginal rights. They find their source in an earlier age, but they have not been frozen in time. They are, as has been said, rights not relics. They are projected onto modern Canada where they are exercised as group rights in the 21st century by modern Canadians who wish to preserve and protect their aboriginal identity.[36]

34. In *Mitchell*, Binnie J. referred to other decisions of this Court in which Aboriginal peoples are understood as being full members of, and participants in, Canadian society:

> In a decision handed down soon after the coming into force of the *Constitution Act, 1982*, *Nowegijick v The Queen*, a tax case, Dickson J. (as he then was) wrote at p. 36, "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all the responsibilities … of other Canadian citizens". See also *Natural Parents v. Superintendent of Child Welfare*, at p. 763, per Laskin C.J., and *Dick v. The Queen*, at p. 326, per Beetz J. In *Gladstone* (at para. 73) and again in *Delgamuukw v. British Columbia*, (at para 165), Lamer C.J. repeats that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign (emphasis added)". The constitutional objective is reconciliation not mutual isolation.[37]

35. Justice Binnie then considered the findings in the *Report of the Royal Commission on Aboriginal Peoples*, and concluded that:

> What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.[38]

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[36] *Mitchell v M.N.R. supra* at para 132. Underlining added. Italics in original.

[37] At para 133. Citations omitted.

[38] At para 135. Also see para 164.

36. These statements cannot apply to Indigenous communities of other countries. Those communities do not "fully participate with other Canadians in their collective governance"; or "live and contribute as part of our national diversity". Nor are they part of "a broader social, political and economic community, over which the Crown is sovereign"; and cannot be said to be "participants with non-aboriginal peoples in a shared Canadian sovereignty".

37. Interpreting s. 35 to include non-Canadian Indigenous communities is also inconsistent with this Court's understanding of s. 91(24). In *Daniels*, the Court understood s. 91(24)'s purpose as involving "the Crown's relationship with Aboriginal peoples in Canada"; Parliament's goal of "reconciliation with *all* of Canada's Aboriginal peoples"; and "the federal government's relationship with Canada's Aboriginal peoples".[39]

38. Federal jurisdiction over the Respondent might arise under s. 91(25), which concerns "naturalization and aliens". But s. 91(24) does not grant authority over the Respondent as an Indian *qua* Indian any more than it does with respect to Indigenous peoples from Mexico or Peru. Given that ss. 35 and 91(24) are to be read together,[40] it would be incongruent for s. 35 to concern non-Canadian Indigenous communities when s. 91(24) does not.

39. Finally, it is difficult to understand why rights would have been entrenched under s. 35 for non-Canadian Indigenous communities, or what would have motivated the framers to contemplate such a novel constitutional measure. As Lamer C.J. held in *Van der Peet*, s.35's purpose should be understood in relation to "the interests it was intended to protect".[41] Had they contemplated the issue (no evidence suggests that they did), it is implausible that the framers would have seen a reason to protect the interests of non-Canadian Indigenous communities, particularly those like the Respondent's community who *already had* harvesting rights recognized in their own country.[42]

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[39] *Daniels* at paras 36, 37 and 49, respectively. Italics in original. Underlining added.
[40] *Ibid*. at para 34.
[41] At para 21.
[42] *Antoine v Washington*, 420 (US) 194 (1975). Appellant's Authorities at Tab 1. For a brief discussion of the protection of Indigenous rights under U.S. law, see Jack Woodward, *Native Law*, loose-leaf (2005 – Rel. 7) vol 1 (Toronto: Thomson Reuters, 2019) at 2-21 to 2-23.

iii. Historic Context

40. The Attorney General is not aware of any constitutional instrument that entrenches Treaty or Aboriginal rights for Indigenous communities of a foreign country. Yet there is nothing in the historical record showing that such an unprecedented constitutional measure was ever contemplated leading up to the *Constitution Act, 1982*.[43] Constitutional rights are not created gratuitously in a contextual vacuum. If s. 35 was intended to include non-Canadian Indigenous communities within its purview, then it is to be expected that there would have been significant discussion and consideration of issues including, but not limited to, the following:

a. Consulting Canadian Aboriginal peoples with respect to potential impacts on their rights by including non-Canadian Indigenous communities within s. 35. The Crown's honour would have required nothing less.

b. Including non-Canadian Indigenous communities in the discussions. It is implausible that those communities would have been included in Canada's Constitution without being heard from.

c. Consulting the U.S. federal government, given that the issue concerns American Indigenous communities within its jurisdiction.

d. Negotiating with U.S. federal and state governments to secure *reciprocal rights* for Canadian Aboriginal peoples to harvest in that Country. Failure to do so arguably would have implicated the Crown's honour and fiduciary responsibilities to Canada's Aboriginal peoples.

[43] *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, 1st Sess., 32nd Parl, 1980. Appellant's Book of Authorities at Tab 4.

e. Canvassing the Provinces' positions, given that expanding rights to non-Canadians would directly impact provincial lands, resources and the enforcement of provincial game laws. The same could be said of the Territories.

41. No consideration of these pertinent issues is found in the historical record, which belies any intention to include non-Canadian Indigenous communities within s. 35's purview.

42. The Factum of the Attorney General of the Yukon demonstrates that for non-Canadians to be cloaked with harvesting rights in Canada, it would be pursuant to treaties negotiated with and signed by *Canadian* Aboriginal peoples, Canada and the relevant provincial or territorial government. No such treaty exists in the present matter.

43. Further, the Yukon agreements do not confer rights on or recognize non-Canadian Indigenous *communities* as "aboriginal peoples of Canada" under s. 35. They only contemplate the possibility of non-Canadian *individuals* benefitting thereunder. Those individuals' participation in the agreements is derivative of the reconciliation achieved by the Crown and the Aboriginal peoples *of Canada* who are signatories thereto.

44. Moreover, the Yukon agreements appear to be unique in this regard. The numbered Treaties covering most of western Canada, by contrast, were not intended to include "American Indians". For the negotiations of Treaty No. 3, for example, Canada's lead negotiator, Lieutenant-Governor Alexander Morris, reported that:

> They explained that some of their children had married in the United States, and they wished them to return and live among them, and wanted them included in the treaty. I told them the treaty was <u>not for American Indians</u>, but any *bona fide British Indians* of the class they mentioned should *within two* years be found *resident* on British soil would be recognized.[44]

[44] Alexander Morris, *The Treaties with the Indians of Canada* (Toronto: Belfords, Clarke & Co., 1880) at 50. Underlining added. Italics in the original.

C. Aboriginal Perspective

45. The Respondent urges this Court to give special consideration to the Aboriginal perspective on the meaning of "aboriginal peoples of Canada" in s. 35. This conflates the *Van der Peet* test with the threshold question. The *Van der Peet* test does not *answer* the threshold question. It is contingent upon it. No special consideration of the Aboriginal perspective was given by this Court to determine the meaning of "Indians" in either the NRTA or s. 91(24). None should be given here.

46. Nor is there any basis to privilege the perspective of non-Canadians, Indigenous or otherwise, on the meaning and intent of Canada's Constitution. It is hard to imagine that the United States Supreme Court would countenance special consideration of a Canadian's perspective on that Country's founding document.

D. Conclusion

47. The constitutional question should be answered as a threshold issue without regard to the *Van der Peet* test. The Court can be guided by how it has addressed parallel threshold questions for the NRTA's harvesting clause and s. 91(24). The Respondent's claim is not supported by s. 35's linguistic, philosophic and historic context, and should have been rejected in the courts below.

PART IV - COSTS

48. The Attorney General does not seek costs and asks that no costs be awarded against him.

PART V - NATURE OF THE ORDER SOUGHT

49. By Order of Côté J. dated March 9, 2020, the Attorney General was granted leave to present oral argument not exceeding five (5) minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan, this 13th day of April, 2020.

R. James Fyfe
Counsel for the Intervener
The Attorney General for Saskatchewan

PART VI – AUTHORITIES

Caselaw:

No.	Authority	Paragraph Reference
1.	*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103	31, 32
2.	*Cardinal v Attorney General of Alberta*, [1974] SCR 695	16
3.	*Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99	2(b), 20, 37
4.	*Daniels v White and The Queen*, [1968] SCR 517	16
5.	*Delgamuukw v British Columbia*, [1997] 3 SCR 1010	8
6.	*Frank v The Queen*, [1978] 1 SCR 95	29
7.	*Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447	17
8.	*Mitchell v M.N.R.*, 2001 SCC 33, [2001] 1 SCR 911	8, 33, 34, 35
9.	*Reference re Eskimos*, [1939] SCR 104	19
10.	*R v Badger*, [1996] 1 SCR 771	15
11.	*R v Blais*, 2003 SCC 44, [2003] 2 SCR 236	2(a), 11, 14, 21, 22, 23, 26, 28
12.	*R v Horseman*, [1990] 1 SCR 901	15
13.	*R v Morris*, 2006 SCC 59, [2006] 2 SCR 915	17
14.	*R v Mousseau*, [1980] 2 SCR 89	15
15.	*R v Pamajewon*, [1996] 2 SCR 821	8
16.	*R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686	8
17.	*R v Van der Peet*, [1996] 2 SCR 507	2, 8, 14, 17, 33, 45, 47
18.	*The Queen v Sutherland et al.*, [1980] 2 SCR 451	16

19.	*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257	8, 17

Statutes:

No.	Statute	Section
20.	*Constitution Act, 1930*, RSC 1985, Appendix II, No. 26	2(a), 9, 10, 11, 12, 14, 15, 16, 29, 30, 44

Secondary Sources:

No.	Secondary Sources	Paragraph Reference
21.	Alexander Morris, *The Treaties with the Indians of Canada* (Toronto: Belfords, Clarke & Co., 1880)	44
22.	Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008)	25

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